

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs August 15, 2006

**STATE OF TENNESSEE v. MARCUS LASHOWN WHITE**

**Direct Appeal from the Circuit Court for Blount County**  
**No. C-15171 D. Kelly Thomas, Jr., Judge**

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**No. E2005-02575-CCA-R3-CD - Filed December 18, 2006**

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The defendant, Marcus Lashown White, pled guilty to aggravated assault, a Class C felony. The plea agreement specified that the defendant was a Range I, standard offender and that the term of sentence was six years, the maximum within the range. The manner of service was to be determined after the sentencing hearing. At sentencing, the trial court denied any alternative sentence. The defendant now appeals. We conclude that the evidence presented at the sentencing hearing was sufficient to rebut the defendant's presumptive eligibility for alternative sentencing. After thorough review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which ALAN E. GLENN, J., and J. S. (STEVE) DANIEL, SR. J., joined.

Raymond Mack Garner, District Public Defender; Julie A. Rice, Assistant Public Defender (on appeal); and Robert White, Maryville, Tennessee (at trial), for the appellant, Marcus Lashown White.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Ellen L. Berez, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

This case concerns an aggravated assault by the defendant who utilized a shotgun and inflicted torture on his live-in girlfriend by the use of a razor.

This court's review of the sentence imposed by the trial court is de novo with a presumption of correctness. T.C.A. § 40-35-401(d) (2006). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999). If the trial court fails to

comply with the statutory directives, there is no presumption of correctness and our review is de novo. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

The burden is upon the appealing party to show that the sentence is improper. T.C.A. § 40-35-401(d) (2006), Sentencing Commission Comments. In conducting our review, we are required, pursuant to Tennessee Code Annotated section 40-35-210(b) (2006), to consider the following factors in sentencing:

(1) [t]he evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing.

A reviewing court should uphold the sentence imposed by the trial court if the sentence complies with the purposes and principles of the 1989 Sentencing Act and the trial court's findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001).

Under the Criminal Sentencing Reform Act of 1989, trial judges are encouraged to use alternatives to incarceration. An especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. T.C.A. § 40-35-102(6) (2006). The following considerations may constitute "evidence to the contrary" and rebut the presumption of alternative sentencing: confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct; confinement is necessary to avoid depreciating the seriousness of the offense; confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. T.C.A. § 40-35-103(1) (2006); see also State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000).

At the time of this offense, a defendant was eligible for alternative sentencing if the sentence actually imposed was eight years or less. T.C.A. § 40-35-303(a) (2003). No criminal defendant is automatically entitled to probation as a matter of law. See T.C.A. § 40-35-303(b) (2006), Sentencing Commission Comments. The defendant must demonstrate that probation would serve the ends of justice and the best interest of both the public and the defendant. State v. Souder, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002).

Marlaina Phillips, the victim, testified at the sentencing hearing concerning the details of the aggravated assault. The victim had been in a relationship with the defendant for four years. They lived together with their twenty-two-month-old daughter and the defendant's three-year-old son. The victim was working a shift from 2:00 p.m. to 10:30 p.m. on August 4, 2004. She phoned the defendant to tell him she was working an additional four hours overtime. The defendant came to her work place at 10:30 p.m. and accused her of infidelity. When the victim arrived at their home at 3:00

a.m. on August 5, the defendant was waiting on the front steps. The defendant escorted the victim to their bedroom and presented her with a choice; to either give up her parental rights to their daughter or to live with him and do as he told her. The defendant was dissatisfied with the victim's response and armed himself with a shotgun. The defendant said, "now, bitch, you're going to tell me what you've been doing." The defendant placed the shotgun barrel in the victim's mouth and informed the victim that he was going to torture her, then kill her. The defendant had his finger on the trigger as he continued to interrogate her. The defendant then obtained the victim's razor and began inflicting cuts on her left foot and leg. The defendant poured alcohol over these wounds.

The defendant took time to phone a co-worker of the victim to question the co-worker about the victim's activities. After this, the victim was able to reach the telephone while the defendant was in the bathroom. The victim dialed 9-1-1 and placed the phone down. This call was recorded and was played for the trial court during the sentencing hearing. Next, the defendant began choking the victim using his forearm and also attempted to pull the nose ring from the victim's nose. The defendant had the victim remove her shorts and underwear. He then used the razor to make cuts on her vagina and again poured alcohol on the fresh wounds. The defendant placed the muzzle of the shotgun to the victim's vagina with his finger on the gun's trigger while continuing his accusatory interrogation.

The incident was interrupted by an officer's knock on the door. The defendant instructed the victim to stay where she was, but she ran outside clad only in one shoe and her t-shirt. The victim stated that she remained fearful of the defendant. After the assault, she moved to her parents' home and slept close to their bedroom. She said she has suffered recurrent bad dreams. The victim also changed her employment to avoid the defendant.

Officers Ron Blair and Rodney Postel of the Blount County Sheriff's Department were dispatched to the scene of the assault. Officer Blair testified that the victim was frantic when she ran from the house. He placed her in the patrol car and saw blood on her foot and on the inside of her legs. A Mossberg, Model 500, 12 gauge pump shotgun was found beside the bed. It contained seven rounds, both buckshot and slug rounds. The chambered round was a three-inch magnum containing buckshot. The safety was in the off position. The bed was wet, and some blood stains were evident. A bottle of alcohol was on the floor beside the bed. Officer Postel stated that he arrived immediately after Officer Blair. Officer Postel said that the defendant was very calm and denied committing any physical assault.

The defendant's first witness was Eleanor Lou Vinton, an Administrative Assistant of Teen Challenge of East Tennessee. Ms. Vinton testified to having facilitated an anger management discussion group in which the defendant participated. The session was over a nine-week period for a total of thirteen and one-half hours. The defendant received a certificate of completion.

The defendant's stepfather, David Upton, stated that he was a minister and served as a volunteer chaplain at Brushy Mountain State Prison. Mr. Upton said he had never witnessed any

violence on the defendant's behalf during the ten years he had known him. The defendant had not told Mr. Upton the details of this assault.

The defendant testified in his own behalf. He stated that he could tell the victim was lying about working overtime the night of these events. The defendant admitted using a razor to inflict cuts and pouring alcohol on the wounds. He further admitted choking the victim. The defendant stated that the safety was always off on the shotgun but that he never used the weapon to threaten the victim. The defendant said, "I threatened myself with the gun." He stated that he had not tried to contact the victim since this offense. He also commented that he knew the victim had a .9 mm gun in her possession.

At the conclusion of the testimony, the trial court considered the testimony as presented, the court file, the victim impact statement, and the presentence report. The trial court then imposed the agreed upon six-year sentence without providing for alternative sentencing. The trial court, while pronouncing the sentence, made the following observations:

The testimony here shows that Mr. White pled guilty to aggravated assault; that being, caused bodily injury to Marlaina Michelle Phillips by use or display of a deadly weapon. And whether Mr. White actually threatened her with the shotgun or not, which I think he did, but still the shotgun was there to enable you to cut her with a razor. And the cuts, including cuts in her private area, were for nothing other than to cause her pain and fear. That's the only reason anybody would do something like that to somebody.

And, you know, it's good that you have taken the steps you've taken and followed the course that you did with Teen Challenge, which points to a better future. But I think something less than confinement would depreciate the seriousness of this offense. I think, as Mr. White was behaving that night, he was certainly extraordinarily dangerous to himself and to – as well as Ms. Phillips. And I don't think any sentence of release, other than parole – because this is a Range I sentence – would be appropriate. The shotgun was loaded, the safety off . . . so, no, I don't think an alternative sentence – I think that presumption has been rebutted by the testimony and the facts.

After due consideration, the trial court concluded that any available alternative sentence would depreciate the seriousness of the offense. See T.C.A. § 40-35-103(1)(B) (2006). In order for this factor to be used to deny alternative sentencing, there must be a finding that the nature and circumstances of the offense are "especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree." See State v. Travis, 622 S.W.2d 529, 534 (Tenn. 1981); State v. Hartley, 818 S.W.2d 370, 375 (Tenn. Crim. App. 1991). While the trial court did not quote the Travis qualifiers verbatim, it did find that the defendant's acts were "extraordinarily dangerous" to the victim and the defendant. The trial court's findings evidenced revulsion toward the torturous aspects of the defendant's behavior. Although the defendant denied threatening the victim with the shotgun, he had pled guilty to the charged offense which, in pertinent part, stated that

the defendant “did cause bodily injury to Marlaina Michelle Phillips by the use or display of a deadly weapon, to wit: a shotgun . . . .” The trial court ultimately found that the facts rebutted the presumption of eligibility for alternative sentencing. We agree.

#### Conclusion

Although the defendant enjoyed a presumption of favorable candidacy for alternative sentencing, the presumption was successfully rebutted by the especially cruel actions of the defendant during the commission of the aggravated assault. The sentence of judgment from the trial court is affirmed.

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JOHN EVERETT WILLIAMS, JUDGE